BORNEO AIRWAYS LTD. v. THE COMMISSIONER OF INLAND REVENUE, KUCHING; HARPER GILFILLAN (BORNEO) LTD. v. SAME

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) December 1, 1967]

[K.L. — Federal Court Civil Appeal No. X. 93 of 1967]

Income Tax — Companies resident in Sarawak — Branch established in Sabah but carrying on a single trade only — Profits made in Sarawak — Losses at Sabah branch — Inland Revenue Ordinance, 1960 (Sarawak), ss. 28, 29 and 43 — Computation of profits under s. 43 on whole basis — Is computation of losses on similar basis, by vritue of s. 29. — Or, is s. 29 to be construed as modified by s. 28(1)? — Meaning of "loss attributable to activities in Sarawak".

Both appellant companies were resident in Sarawak, with the management and control also in Sarawak. Both had branches in Sabah and each company carried on a single trade only. Profits were made in Sarawak, but losses were incurred at the branches abroad. The Commissioner of Inland Revenue having disallowed a set-off of the branch losses against the profits made in Sarawak, his decision was upheld by Harley J. on the ground that under section 28(1) only "loss attributable to activities in Sarawak" are allowable for set-off against profits made in Sarawak. Upon further appeal by the companies to the Federal Court:—

Held: (Ong Hock Thye F.J. dissenting): on the true construction of section 28, "loss attributable to activities in Sarawak" only, and not elsewhere, may be set-off, even though this interpretation produced inequitable results.

Per Ong Hock Thye F.J. dissenting: (1) since computation of income is on a whole basis by virtue of section 43, it is matched by section 29 for computation of losses "in like manner as assessable profits are computed", as conceded by the Commissioner of Inland Revenue himself; (2) in section 29 the opening words are "For the purposes of section 28", and not "subject to the provisions of section 28" so that in effect section 29 governs the application of section 28; (3) "activities in Sarawak" in section 28(1) can only mean activities of control and management, because this interpretation gives effect equally to the provisions of sections 28, 29 and 43 whereas the other construction by the commissioner can only be valid if section 29 "became wholly irrelevant, meaningless and nugatory merely by reason of a sidewind arising out of those words in section 28," and (4) the maxim *ut res magis valeat quam pereat* should apply.

[Editorial Note: The Inland Revenue Ordinance, 1960 (Sarawak Ordinance No. 13 of 1960) was repealed by the Income Tax Act, 1967 which is now law throughout Malaysia.]

Cases referred to:—

(1) *Tennant* v. *Smith* [1892] A.C. 150, 164.

(2) *Canadian Eagle Oil Co.* v. *R.* and *Selection Trust Ltd.* v. *Devitt* (*Inspector of Taxes*) [1946] A.C. 119, 140.

(3) *Hong Kong Whampoa Dock Co. Ltd.* v. *Inland Revenue Department* [1960] H.K.L.R. 166.

(4) *I.R.C.* v. *Ross & Coulter* [1948] 1 All E.R. 616, 625.

(5) *Ditcher* v. *Denison* (1857), 11 Moore P.C. 325, 337.

FEDERAL COURT.

G. S. Hill for the appellants.

Wan Hamzah bin Wan Mohamed Salleh (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Barakbah L.P.: This appeal concerns three appeals which were consolidated by Harley J. when they came on for hearing in the High Court at Kuching as they were based on the same grounds. The appellant companies who were aggrieved by the assessments made upon them under the Inland Revenue Ordinance, 1960, appealed to the Commissioner of Inland Revenue and the commissioner in Civil Appeals Nos: K.5 of 1966 and K.7 of 1966 without a formal hearing under section 80 dismissed the two appeals. He also dismissed the appeal in Civil Appeal No: K.6 of 1966 after a formal hearing.

The appellant companies, it would appear, carried on a single trade in Borneo with general direction from Sarawak and with branches in Sabah and Brunei. We are not here concerned with the State of Brunei. It is an accepted fact that the business is controlled from Sarawak. As the facts have been fully stated in the judgments of the commissioner I need not go into them again.

According to the submission of counsel only two points of law should be considered in this appeal, namely:

(1) Does section 43 permit the Commissioner of Inland Revenue to include in his assessment on a company carrying on a trade which is controlled or managed in Sarawak any profits arising in branches outside Sarawak without setting off any losses incurred in other branches outside Sarawak in the same basis period?

(2) Assuming that the answer to (1) is in the negative, does section 28 nevertheless restrict relief in respect of past losses brought forward to the losses incurred in the Sarawak branch, even though the profits of other branches with past losses are included in the assessment?

These two questions can be answered together and the relevant laws applicable here, in my view, are sections 18, 28, 29, 42 and 43 of the Inland Revenue Ordinance, 1960, which read as follows:—

"18. (1) Corporation profits tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every corporation carrying on any trade, profession or business in Sarawak in respect of profits of the corporation accruing in, derived from or received in Sarawak from such trade, profession or business.

(2) Corporation profits tax shall be charged for each year of assessment at the rate specified in Part A of the Second Schedule on the assessable profits of a corporation

ascertained in accordance with the provisions of this Part.

(3) Any sum accruing in, derived from or received in Sarawak, other than a sum from the sale of capital assets, received by or credited to a corporation carrying on a trade, profession or business in Sarawak shall be deemed to accrue from the trade, profession or business carried on:

Provided that notwithstanding this section, subsection (1) of section 42 and section 43 corporation profits tax shall not be charged on any profits of any such corporation which are derived from the States of Malaya or Sabah.

28. (1) Subject to the provisions of subsection (3), where a loss is incurred in the basis period for any year of assessment by a person chargeable to tax under this Part, the amount of such loss attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of such person for that year of assessment.

(2) Where the amount of loss which may be set off under subsection (1) is such that it cannot be wholly set off against the assessable profits for the year of assessment in the basis period for which the loss occurred, the amount not so set off shall be carried forward and shall be set off against what would otherwise have been assessable profits for the future years in succession:

Provided that the amount of any such loss allowed to be set off in computing the assessable profits for any year of assessment shall not be set off in computing the assessable profits for any other year of assessment.

(3) No losses incurred by any person in any year prior to the year preceding that commencing on the 1st January, 1961 shall be taken into account for the purposes of this section:

Provided that in respect of a person who immediately prior to the commencement of this Ordinance was chargeable to tax under the repealed Ordinance —

(i) such losses may be taken into account; and

(ii) all losses so taken into account shall be computed in accordance with the provisions of this Ordinance.

29. For the purposes of section 28, the amount of any loss incurred by a person chargeable to tax under this Part, shall be computed in like manner as assessable profits are computed.

42. (1) In this Part the expression 'profits accruing in, derived from or received in Sarawak' shall, without prejudice to the generality of its meaning, include all profits from business transacted in Sarawak, whether directly or through an agent.

(2) In the case of any doubt as to whether a profit is for the purposes of this Part a profit accruing in, derived from or received in Sarawak the onus of proving that such profit is not such a profit shall be on the person charged to tax in respect of such profit.

43. Notwithstanding anything contained in section 42, for the purposes of assessment under this Part the whole of the income derived by any person from any trade, profession or business shall be deemed to accrue in, be derived from or be received in Sarawak if the control or management of such trade, profession or business is exercised in Sarawak."

It is not disputed that sections 18, 28 and 29 are similar to the Hong Kong Inland Revenue Ordinance (Cap. 112), but section 43 is not in the Hong Kong Ordinance. It is clear from section 43 that the reference is to the *whole of the income* and according to section 2 the word "income" includes "profits". No reference is made to "loss". According to Lord Macnaghten in *Tennant* v. *Smith* [1] the tax whether under Schedule D or E is "not on what saves his pocket, but on what goes into his pocket". In my opinion it was the intention of the Legislature to impose tax on profits obtained outside Sarawak. The intention is made apparent by the fact that it was not in the Hong Kong Inland Revenue Ordinance but specially stated in the Sarawak Ordinance.

As far as tax on loss is concerned, in my opinion, the true construction of section 28 is that such loss must be attributable to *activities in Sarawak* only and not elsewhere. In my view there is no ambiguity about it. It may well be that it is inequitable that such loss elsewhere should not be taken into account but the law as regards income tax is very strict. In the case of *Canadian Eagle Oil Co. Ltd.* v. *The King* and *Selection Trust Ltd.* v. *Devitt* (*Inspector of Taxes*) [2] Viscount Simon had this to say:—

> "In the words of the late Rowlatt J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, 'in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' "

I am therefore in full agreement with the judgments of the Commissioner of Inland Revenue and Harley J. and would accordingly dismiss the appeal with costs.

Azmi C.J. (Malaya): This is an appeal by Harper Gilfillan (Borneo) Limited (hereinafter referred to as the company) against the judgment of Harley J. dismissing the company's appeal against the decision of the Commissioner of Inland Revenue, Sarawak, but since the learned judge merely said that he agreed with the commissioner without giving any other reasons of his own, it would only be necessary therefore to refer to the grounds of decision of the commissioner.

The company was incorporated in Sarawak on 12th August 1959 and in 1961, established branches in Sabah and Brunei. The control and management of the company's trade or business was and has always been throughout the relevant period exercised in Sarawak.

For the basis period for the years of assessment 1960 and 1961 when the business was carried on only in Sarawak there was a profit, but for the periods 1962 to 1963, losses were incurred for the business in Sabah and Brunei and in 1962 in Sarawak. There was however, profit for the period 1964.

It is not disputed that the appellant was carrying on a single trade.

The company contended before the commissioner and also here that in computing the assessment for the year of assessment 1965 the Sabah losses in the basis periods for the years of assessment 1962 and 1963 should be carried forward and set off against the profits for the year of assessment 1965.

The commissioner was of the view that the Sabah losses not being losses attributable to the activities in Sarawak could not therefore be set off against the profits for the year of assessment 1965.

I will now set out the relevant sections of the Sarawak Inland Revenue Ordinance 1960:—

"28 (1). Subject to the provisions of subsection (3), where a loss is incurred in the basis period for any year of assessment by a person chargeable to tax under this Part, the amount of such loss attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of such person for that year of assessment."

"29. For the purposes of section 28, the amount of any loss incurred by a person chargeable to tax under this Part, shall be computed in like manner as assessable profits are computed."

"43. Notwithstanding anything contained in section 42, for the purposes of assessment under this Part the whole of the income derived by any person from any trade, profession or business shall be deemed to accrue in, be derived from or be received in Sarawak if the control or management of such trade, profession or business is exercised in Sarawak."

It will be seen that under section 43 the whole of the income derived by a person from any trade, shall be deemed to accrue, derived from or received in Sarawak if the control or management of such trade is exercised in Sarawak, with the result that any profit made by the company in Sabah is profit of the company. On the other hand, in reference to losses, section 28 provides that only the amount of such loss attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of a person for the year of assessment in question. As the learned commissioner said:—

"In my opinion it is clear from the words (the amount of such loss attributable to activities in Sarawak) that the loss to be allowed is not the whole of the losses computed in accordance with the provisions of section 29 but only that part of the loss which is attributable to Sarawak. Thus although under section 29 the losses are to be computed in the same manner as assessable profits are computed, that loss is not deductible in full unless it is attributable to activities in Sarawak."

The learned commissioner then went on to distinguish between what he calls "a trade" and "the activities of a trade", by saying that the company carried on a single trade but the activities of that trade were admittedly carried on in Sarawak, Sabah and Brunei. He declined to accept the appellant's submission that "activities" meant activities of control and management.

The appellant now contends before us that the learned commissioner had given a too literal interpretation to section 28 sub-section (1) of the Inland Revenue Ordinance which limits the losses which can be set off to "those attributable to activities in Sarawak" but that he should on the true construction of sections 28, 29 and 43 hold that the term "losses attributable to activities in Sarawak", in a case of a person to which section 43 applies, to mean losses wherever they arose.

In his argument for the company before us, Mr. Hill pointed out that the relevant provisions of the Sarawak Ordinance are substantially similar to those of Hong Kong but with one exception in that Sarawak added the provisions of the vital section 43 with the result that in so far as the profits are concerned they are assessable wherever derived, provided that they are profits from a trade the control or management of which is exercised in Sarawak. In Hong Kong, profits from operations from outside Hong Kong are not assessable. (See *Hong Kong Whampoa Dock Co. Ltd.* v. *Inland Revenue Department* [3]). On the other hand, Hong Kong's policy of confining loss attributable to internal activities only, is retained in Sarawak's section 28. It would therefore be clear to my mind that it was the intention of this legislation that on the one hand the whole of the income derived by a person shall be deemed to accrue in, be derived from, or be received in Sarawak if the control or management of such trade, profession or business is exercised in Sarawak. Whereas on the other hand, only losses attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of such person. In my view, the language of this Ordinance is clear. As Viscount Simon L.C. said in *Canadian Eagle Oil Co.* v. *R.*[2]:—

"In the words of the late Rowlatt J. (in *Cape Brandy Syndicate* v. *I.R.C.* [1921] 1 K.B. 64, 71) whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase 'In a taxing act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'"

Again, as Lord Thankerton said in *I.R.C.* v. *Ross and Coulter* [4] at page 625:—

"Counsel are apt to use the adjective "penal" in describing the harsh consequences of a taxing provision but if the meaning of a provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is capable of two alternative meanings, the courts will prefer that meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effects."

In my view, it is plain in this matter that the Ordinance intends to disallow the assessment of losses due to activities outside Sarawak and in the circumstances I would have no other alternative but to dismiss the appeal with costs.

Ong Hock Thye F.J.: This is an appeal against the judgment of Harley J. dismissing consolidated appeals against the decision of the Commissioner of Inland Revenue, Sarawak.

Both the appellant companies were resident in Sarawak, with the management and control of each also in Sarawak. Both companies at all relevant times had branches in Sabah and Brunei and each carried on a single trade only. Profits were made in Sarawak, but losses incurred at the branches. The facts concerning Harper Gilfillan (Borneo) Limited, one of the appellants, have been set out in the judgment of the learned Chief Justice and need not be repeated here.

Two questions of law were raised by agreement before Harley J. namely:

(a) Does section 43 of the Inland Revenue Ordinance, 1960, of Sarawak, permit the Commissioner of Inland Revenue to include in his assessment on a company carrying on a trade which is controlled or managed in Sarawak any profits arising in branches outside Sarawak without setting off any losses incurred in such branches outside Sarawak in the same basis period?

(b) If not, does section 28 nevertheless restrict relief in respect of past losses brought forward to the losses incurred in the Sarawak branch, even though the profits of other branches with past losses are included in the assessment?

In the words of Harley J., "We are concerned with corporation tax and with companies carrying on a single trade in Borneo, with general direction from Sarawak, and with branches in Sabah and Brunei." For present purposes no question arises regarding Brunei.

As the learned judge pointed out, section 18(1), section 28(1) and (2) and section 29 of the Sarawak Ordinance correspond to section 14(1), section 19(1) and (2) and section 19A(1) of the Inland Revenue Ordinance of Hong Kong. But the Hong Kong Ordinance has no provision similar to the Sarawak section 43 which is as follows:—

"Profits deemed to accrue where control or management is exercised.

43. Notwithstanding anything contained in section 42, for the purposes of assessment under this Part the whole of the income derived by any person from any trade, profession or business shall be deemed to accrue in, be derived from or be received in Sarawak if the control or management of such trade, profession or business is exercised in Sarawak."

Herein lies the essential difference, in my opinion, between the Sarawak and the Hong Kong Ordinances, the former being on a world basis, involving the application of English principles of unified trade as against the Hong Kong idea of divisible trade on a territorial basis (see decision of the Supreme Court of Hong Kong in *Hong Kong & Whampoa Dock Co. Ltd.* v. *Inland Revenue Department* [3]). In that case what fell to be decided was the scope of the words "profits arising in or derived from the Colony". The problem would not have arisen at all had there been a section in the Colony Ordinance corresponding to the Sarawak section 43 which should have resolved the question at issue.

Since the Sarawak computation of income is on a world-wide scale by virtue of section 43, it is matched — as it should be, in fairness and good sense — by section 29, for computation of losses, as follows:—

"Computation of losses.

29. For the purposes of section 28, the amount of any loss incurred by a person chargeable to tax under this Part, shall be computed in like manner as assessable profits are computed."

(*cf.* section 19A(1) of the Hong Kong Ordinance).

This section is interpreted by the learned Commissioner of Inland Revenue himself, in my view quite rightly, as follows:—

"Section 29 provides that for the purposes of section 28 the amount of any loss incurred by a person shall be computed in like manner as assessable profits are computed. In computing the assessable profits of a person, the control or management of whose trade is exercised in Sarawak, the total profit is deemed to accrue in, be derived from or be received in Sarawak. Similarly the loss of such a person should be deemed to accrue in or be derived from Sarawak."

It should be specially noted that the opening words of section 29 are not "Subject to the provisions of section 28", but, on the contrary, "For the purposes of section 28". Can there be any doubt, therefore, that section 28 is governed by section 29? Clearly it must be so, for the simple reason that, before any question of "treatment" of loss can arise under section 28, there must first of all be a "computation" thereof in the manner provided by section 29. Section 29 is thus a condition precedent, without which section 28 can have no effect.

The question Harley J. posed to himself in the course of his judgment was: Whether section 43 completely alters, or qualifies, the interpretation of section 28, particularly the words: "the amount of such loss attributable to activities in Sarawak." In the event he held that: "It may well be that losses generally should be computed similarly to profits but it does not follow that particuar losses incurred outside the territory of Sarawak can be set off against profits made inside Sarawak", the reason, in his view, being that section 28(1) expressly limits the losses which can be set off to those "attributable to activities in Sarawak".

With respect, I am unable to accept such an interpretation of section 29 whereby it became wholly irrelevant, meaningless and nugatory by reason of a sidewind arising out of those words

in section 28. Once the basic principle for computation of losses is laid down without any trace of ambiguity, can it nevertheless be overruled by another section clearly subordinated by express words to itself?

I am also unable to perceive the distinction between "a trade" and the "activities of a trade", which the commissioner thought all-important. Is there any form of trade that can go on spontaneously without any form of activity whatsoever? In my judgment "activities in Sarawak" can only mean activities of control and management because this interpretation gives effect equally to the provisions of sections 28, 29 and 43, whereas the other construction by the commissioner can only be valid if section 29 is wholly disregarded. I should have thought that where there is more than one possible meaning and one is reasonable, and the other not, it is unnecessary to apply a literal interpretation if some other reasonable meaning can be applied. Moreover, my interpretation of section 28 accords with the maxim: *ut res magis valeat quam pereat.*

"It is a good general rule in jurisprudence," said the Judicial Committee in *Ditcher* v. *Denison* [5] "that one who reads a legal document whether public or private, should not be prompt to ascribe — should not, without necessity or some sound reason, impute — to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use."

Indeed, from the factual, rather than the artificial point of view, one may well ask whether there could have been carried on any branch business which was running at a loss unless it was actively kept going by funds supplied by the management in Sarawak. To use a metaphor, is it not the engine which supplies the motive force for the wheels? What turns the wheels if the engine is dead? My answer, therefore, to both questions is the reverse of that given in the court below.

I am all the more gratified in being able to arrive at this decision because a construction leading to unreasonableness is thus avoided. There is, of course, no presumption that a taxing statute normally errs on the side of unfairness and injustice towards the subject. With all respect, therefore, I am unable to agree with the judgments of my learned colleagues, whose reasons, such as they are, seem to be nothing more than that the five words in section 28 are all that need be taken into account regardless of sections 29 and 43. It is true that "there is no equity about a tax. There is no presumption as to a tax", but the mere fact that section 28 produces inequitable results is no reason for holding it to be valid.

For my part, I would allow this appeal, with costs here and in the court below.

Appeal dismissed.

PUBLIC PROSECUTOR v. OIE HEE KOI & ASSOCIATED APPEALS

[P.C. (Lord Hodson, Lord Guest, Lord Wilberforce, Sir Douglas Menzies & Sir Garfield Barwick) December 4, 1967]

[Privy Council Appeals Nos. 16 & 36 of 1966 and 9 to 17 of 1967]

International law — Prisoners of war — Treatment of — Whether captured nationals or individuals owing allegiance to detaining power entitled to treatment as prisoners of war.

Geneva Conventions — Geneva Convention relative to the Treatment of Prisoners of War, 1949, arts. 2, 5 and 85 — Geneva Conventions Act, 1962 — Scope and applicability of provisions — Determination of status of prisoners of war — Nationals of detaining power or individuals owing allegiance captured in territory of detaining power — Whether entitled to benefits under Geneva Convention.

Internal Security — Possession of arms and explosives — Consorting with persons in — Security area — Proclamation — Internal Security Act, 1960, ss. 2, 47, 57(1)(a), (b), 58 and 80.

Criminal Law and Procedure — Consent — Public Prosecutor prosecuting himself — Charge — Particulars — Errors — Criminal Procedure Code (Cap. 6), ss. 152(i), 153(i) and 156 — Costs of appeal.

Accused in these cases were Malaysian Chinese, born or settled in Malaysia but whose nationality had not been proved. They were all captured during the Indonesian confrontation campaign against Malaysia having landed and infiltrated into Malaysian territory either by boat or by parachuting. They were armed and accompanied by Indonesian military personnel.

All the accused were tried, convicted and sentenced to death for offences under the Internal Security Act, section 57(1)(a) and (b) and section 58. Except for one case (*Teo Boon Chai* v. *Public Prosecutor*) none of the accused claimed during trial, that he was to be treated as a prisoner of war. They appealed to the Federal Court which dismissed all but two appeals, i.e. *Public Prosecutor* v. *Oie Hee Koi* and *Public Prosecutor* v. *Ooi Wan Yui* ([1966] 2 M.L.J. 183). In these two cases, the Federal Court allowed the appeals on the ground that as they had not been proved to be persons owing allegiance to Malaysia, they were entitled to the protection of the Geneva Convention. The Public Prosecutor, in those two cases, and the other accused appealed to the Privy Council.

In the Privy Council, the accused argued (a) that the provisions of the Geneva Convention were also applicable to Malaysian nationals or persons owing allegiance; (b) that any contrary customary international law denying the status of prisoners of war to such individuals had been abrogated by the Geneva Convention; (c) that the convictions under section 58 of the Internal Security Act (consorting with persons carrying or having possession of arms or explosives in contravention of section 57(1)), were bad because the only persons they consorted with were Indonesian soldiers who were not persons to whom section 57 applied.

Held (Lord Guest and Sir Garfield Barwick dissenting): (1) the Geneva Convention does not extend the protection given to prisoners of war to nationals of the detaining power. The same principle applies to persons who, though not nationals of, owe a duty of allegiance to the detaining power;

(2) the Geneva Convention had not changed or abrogated customary international law on this question;